STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EG14GB-64604
EEOC CHARGE NO. 17E-2014-00358

Amala S. Merritt and the Director of the NJ Division on Civil Rights,	)	Administrative Action
Complainants,	)	**FINDING OF PROBABLE CAUSE**
v.	)	
VNA of Central Jersey,	)	
Respondent.	)	

On April 24, 2014, Amala S. Merritt (Complainant)[1] filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, VNA of Central Jersey (Respondent),[2] discriminated against her on the basis of pregnancy in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety.

Respondent describes itself as a "premiere Medicare/Medicaid-certified provider of home health, hospice, and community-based services" with its principal place of business in Red Bank.

Complainant is a West Orange resident who was hired by Respondent as a full-time visiting registered nurse on November 6, 2013, at $35.53/hour, and given a start date of December 2, 2013, with a ninety-day probationary period.

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1 The DCR Director hereby intervenes as a complainant pursuant to N.J.S.A. 13:4-2.2(e). However, for purposes of this finding, "Complainant" will refer only to Ms. Merritt.

2 In the verified complaint, Respondent was identified as "Visiting Nurses Association." However, the caption has been modified to reflect the assertion from Respondent's counsel that the entity's proper name is "VNA of Central Jersey."

Her job responsibilities included scheduling patient appointments, assisting patients with their health-care needs, and completing certain documentation for each visit in a timely manner. She reported to Rebecca Denis, R.N. (Manager of Nursing) and Fara Haghshenas, R.N. (Patient Care Director).

At some point, she informed Respondent that she was pregnant and planned to take maternity leave from February 7, 2014, to April 4, 2014. On February 5, 2014, Haghshenas met with Complainant to discuss her "late documentation" and productivity. Complainant alleged that Haghshenas said, "I know you're getting ready to go out on leave. You haven't completed your probationary period. Normally we would terminate you but I don't want to do that." Complainant alleged that Haghshenas suggested that she consider returning to work for Respondent as a *per diem* employee once the maternity leave was over to avoid a full-time schedule.

Haghshenas acknowledged telling Complainant that she was not firing her.

Complainant said that she was "stunned" a few weeks later when she received a letter stating, in part, "Effective as of the 1st day of March 2014, you will no longer be covered under the Life Insurance and Long Term Disability Plans due to your Termination of Employment." See Letter from Sheila Chelednik, Benefits Analysit, VNA Health Group, to Complainant, Feb. 14, 2014.

There is no dispute that when Complainant asked Haghshenas about the letter referencing her termination of employment, Haghshenas replied, "I had no other choice."

Nor is there any dispute that when Complainant was on leave, Haghshenas completed an HR departure form stating that Complainant's last date worked was February 7, 2014. In the section of the form entitled, "Complete This Section for Change in Employment Status," Haghshenas wrote, "Termination due to failure to complete probationary period due to medical reason." See Human Resources Status Report, Feb. 11, 2014. In the section entitled, "Complete This Section for Any Employee Who Leaves the Agency," Haghshenas checked "Failure to Complete Probation," and wrote "period due to medical reason." Ibid.

Respondent insists that despite what was written on its internal HR form, Complainant was actually discharged for legitimate non-discriminatory reasons:

> Complainant was unable to be present for the hours required or fulfill her responsibilities in a timely manner despite several warnings which led to poor productivity negatively affecting her performance. Complainant was required to begin her day at 8:30 a.m. However, Complainant was not able to begin until 9:30 or later every day. In fact, Complainant, who was required to in attendance at 8:30 a.m. at the mandatory orientation session, arrived at 10:00 a.m. Further, Complainant did not always complete her visit reports on a timely basis. As a result, medical providers, including physicians, would not know how to treat any given patient because these providers relied upon the reporting of the staff nurses.
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> [See Respondent's Response to Document and Information Requests, p. 2.]

During the DCR fact-finding conference, Denis, Haghshenas, HR Director Mark Parauoa, and HR Generalist Linda R. Duddy provided more detail about their on-going concerns with Complainant's performance. For example, Denis stated, "The doctor's offices were calling about their patients and complaining that their patients weren't being seen because the documentation wasn't in properly. So it reflects bad on us. The documentation needs to be competed within 24-48 hours. Therapy can't go in without the documentation being submitted."

Haghshenas stated that Complainant was a "really good nurse, but if the documentation isn't made properly or not made in a timely manner, it puts the patient at risk because they then have to wait for treatment until the documentation is made." She stated, "We know [Complainant] is competent. The whole issue was productivity."

Complainant appeared to acknowledge that there were issues with productivity and submitting documentation on time. However, she argued that any such matters were overstated, reasonably excusable and/or not severe enough to warrant termination. There was no record of any disciplinary history in Complainant's personnel file.

Haghshenas stated during the fact-finding conference that she thought Complainant was a "wonderful person." She stated that said did not provide the actual explanation on the HR form because if she had cited performance-related reasons, the company would never have considered

bringing back Complainant on a *per diem* basis. Haghshenas stated, "I lied about what the reason was to protect [Complainant]. I shouldn't have done that."

Analysis

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits. The quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799.

The LAD makes it illegal to "discharge" or otherwise discriminate against an employee in the "terms, conditions or privileges of employment" based on pregnancy. N.J.S.A. 10:5-12(a). The LAD also prohibits an employer from treating a pregnant employee "in a manner less favorable than the treatment of other persons . . . similar in their ability or inability to work." N.J.S.A. 10:5-12(s). In such cases, the complainant typically argues that the legitimate, non-discriminatory explanation proffered by the employer was merely a pretext designed to mask an illegal motive. However, in this case, the opposite is true. Respondent is asking DCR to find that the illegal explanation it provided was merely a pretext designed to mask its legitimate, non-discriminatory motive. Respondent does not argue that it would have been justified in discharging an employee

on maternity leave on the grounds that she failed to complete a probationary period.[3] Rather, it insists that the above scenario did not occur.

The Director is satisfied that a hearing on the merits is warranted. The critical function is to ascertain the true motive behind this personnel decision. The decision-maker has provided two conflicting explanations. One is illegal, the other is not. Although Respondent may ultimately persuade a fact-finder that it acted with no discriminatory animus and that the discharge was based on legitimate performance standards uniformly applied regardless of pregnancy, at this preliminary stage of the process, the Director finds that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56.

WHEREFORE, it is on this 5th day of December 2014, found that PROBABLE CAUSE exists to credit the allegations that Respondent violated the LAD.

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

[3] Presumably, Respondent recognizes that it would be required to attempt to reasonably accommodate someone who is unable to complete a probationary period because of a disability. See N.J.S.A. 10:5-12(a), N.J.A.C. 13:13-2.5(b).